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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT, STORE UNION, AFL-CIO,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION

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Statute

National Labor Relations Act, as amended, 29 U. S. C. 151, et seq.:

Section 7 3

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1. Following its pattern, characterized by the court below as "Changing horses in midstream" (Pet. App., p. A. 6), Board counsel has now, in its brief in opposition, presented still another markedly contradictory justification for the Board's decision in the instant case—an approach that was earlier rejected by the Board itself in its own opinion.

In its initial decision (Pet. App., pp. A. 33-40), the Board conceded that *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), "establishes the

Union's right to picket at the location it chose . . ."; that Hudgens' private property rights at its enclosed mall shopping center could be dislocated in favor of pickets who had no working relationship with the Center simply because the Center property was "generally open to public access during normal business hours" (Pet. App., pp. A. 37-38). However, after obtaining a remand from the Court of Appeals to reconsider that view in light of this Court's decision in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972), the Board recognized that "the test of lawful union activity . . . is not that enunciated in *Logan Valley* . . . [c]learly the test now to be applied to the case at bar is that set out in [*N. L. R. B.* v.] *Babcock and Wilcox* [*Co.*, 351 U. S. 105 (1956)]" (Pet. App., pp. A. 23, A. 31).[1] Upon review of that supplemental decision in the court below, the Board shifted ground again and asserted a third position, i.e., that "this case is controlled by *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793 (1945)" (Pet. App., p. A. 6). And now, in opposition, the Board has returned full circle to its own previously-reversed initial decision. It contends that since the Center "has all the attributes of a business district devoted to public use" and "has acquired many of the characteristics of the normal municipal 'business block'" (Opp., pp. 7-8), *Logan Valley* is controlling. This argument, apart from constituting impermissible *post-hoc* rationalizations of appellate counsel (see *Metropolitan Life Insurance Co.* v. *N. L. R. B.*, 380 U. S. 438 (1965)), is a return to the practice of adjudicating Labor Act cases by constitutional principles and therefore flies

1. The Board asserts (Opp., p. 8, n. 8) that the above quotes from the Board's Administrative Law Judge's opinion are not attributable to the Board itself which, it is asserted, did not rely on the Law Judge's "rationale." This is clearly specious. The Board both adopted the Law Judge's recommendation and expressly relied upon *Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27, 83 LRRM 1066 (1973) (Pet. App., p. A. 18). And, in *Peddie*, the Board stated that "For the reasons expressed by the Supreme Court in *Central Hardware, supra*, we find the principles of *Babcock and Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case." 83 LRRM at 1068.

in the face of this Court's contrary admonition in *Central Hardware*, 407 U. S. at 545.[2]

The return to adjudication of Labor Act questions by the *Logan Valley* constitutional analysis undermines *Central Hardware*, just as the court below's adjudication of the rights of strangers on private property by the *employee* standards of *Republic Aviation* undermines *Babcock and Wilcox*. Review by this Court is, therefore, necessary to provide much needed guidance in this area and to clarify the meaning and interrelationship of *Logan Valley*, *Babcock and Wilcox*, *Central Hardware*, and *Republic Aviation*.

2. Certiorari is further warranted to review the conflict between the decision below and that of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (1974). In opposition, the Board attempts to escape this conflict by alleging that *Peddie* is "clearly distinguishable." (Opp. pp. 10-11.) Again, however, the Board contradicts itself, for its supplemental decision's finding of a violation was expressly based on "the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*" (Pet. App., p. A. 18.) The decision below, therefore, contrary to the Opposition, creates an undesirable lack of uniformity in the administration of the Act, which should be resolved by this Court.

2. The Board asserts (Opp., p. 9, n. 10) that the *Central Hardware* restriction against adjudicating Labor Act cases by *Logan Valley* constitutional precepts was not breached here because this Court assertedly did not intend to "preclude the Board, in defining the scope of Section 7 rights under the National Labor Relations Act, from utilizing the *Logan Valley* factors in the other factual settings where they would be appropriate." That, however, begs the question. A reference to constitutionally relevant criteria was not meant to, as in this case, *totally displace*, nor provide an alternative decision-making base, to the Section 7 analysis imposed by *Babcock*, which turns on whether the Board's General Counsel has carried his burden of establishing that alternative means of communication are unavailable.